



NATIONAL ASSOCIATION OF REALTORS®

The Voice For Real Estate®

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Federal Trade Commission
Office of the Secretary
Room 159-H (Annex D)
600 Pennsylvania Ave, N.W.
Washington, D.C. 20580

Re: “CAN-SPAM Act Rulemaking, Project No. R411008,” 69 *Federal Register* 48, 11775-11782 (March 11, 2004) – “Primary Purpose,” “Transactional or Relationship Message,” “Sender” and Other Definitional Issues.

Dear Sir or Madam:

The National Association of REALTORS® (“NAR”) appreciates the opportunity to provide comments to the Federal Trade Commission (“Commission”) on the definitions, implementation, and reporting requirements of selected topics contained within the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the “Act”). NAR represents approximately 1,000,000 real estate professionals engaged in all aspects of the residential and commercial real estate business, as well as some 1500 state and local associations of REALTORS®. Both NAR and its members have a significant interest in the outcome of this proposed rulemaking.

NAR focuses these comments on four specific areas about which the Commission has sought input. First, NAR proposes that the Commission implement a simple test to determine the “primary purpose” of an electronic mail message. Second, NAR requests clarification of the “transactional or relationship message” definition contained in the Act to clearly establish that it covers communications between an association and its members for association-related activities and benefits, and between real estate professionals and their clients and customers the in ordinary course of the relationships those parties form. Third, NAR seeks a longer period for businesses to respond to opt-out requests, as the proposed 10-day period is not reasonable and imposes a costly burden upon small businesses like a real estate brokerage. Finally, NAR seeks clarification of the Act’s definition of “sender,” including application of that term in the context of “forwarded messages.”

Below is a discussion of the arguments in support of NAR’s positions on these issues.

I. NAR Proposes Simplified “Primary Purpose” Test

NAR encourages the Commission to create a simple “primary purpose” test so that it will be clear to associations like NAR which of its communications are commercial electronic mail messages subject to the Act’s requirements.

Trade associations like NAR and its state and local associations commonly use electronic mail to provide members with information about association business and benefits, such as meeting information, association activities, legislative activity, legal news, and a variety of other subjects. These various activities and programs, along with the communications that describe them, are precisely what members expect and desire to receive from the association. Correspondingly, the fundamental reason associations send such messages to members is to communicate such information to the members, even though the messages may also contain information about products, services, or events offered through the association. This promotional information is generally an insubstantial portion of the message, and would not be the subject of an independent, “self-standing” message if the association did not seek to distribute to members non-commercial content about association programs, activities and benefits. In other words, associations commonly transmit electronic mail messages to their members containing content to which the Act would not apply, but which messages also include incidentally promotional information the delivery of which is not the “primary purpose” for the message.

NAR proposes that the Commission adopt regulations that establish a “primary purpose” test, which focuses on whether the commercial portion of the electronic mail message is the dominant portion of the electronic mail message, taking into consideration a variety of factors. One factor to be considered is, as noted above, whether the sender would transmit the message even if all commercial solicitations were removed from the electronic message. Put another way, the criteria should ask whether the *non-commercial* portion of the electronic message stands, and would be sent by the association, on its own? If so, then the message is not a commercial electronic message. Another factor to be considered would be the extent of the non-commercial communications between the parties. Since an organization like NAR already engages in an extensive amount of non-commercial communications with its membership, this factor should weigh towards a finding that the primary purpose of a message is not subject to the Act’s requirements. Yet another factor would simply compare the amount of promotional and non-promotional content of a message, measured in some appropriate way. Other factors might also be included. This standard would also not unduly burden NAR and its member associations with additional requirements when it sends messages to its membership.

II. “Transactional or Relationship Message” Definition Needs Clarification

NAR seeks modification of the “transactional or relationship message” definition so that it clearly applies in certain circumstances. First, NAR believes that the relationship between trade associations like NAR or its state and local associations and their members is sufficiently analogous to an ongoing commercial transaction that communications from the association to its members should be considered “transactional or relationship” messages, to which the requirements of the Act do not apply. Second, ongoing e-mail communications between real estate professionals and their clients and customers should qualify as “transactional or relationship” messages, even though the relationship between them may not be an ordinary commercial transaction including payment, or a promise to pay, consideration in some form.

Finally, the “transactional or relationship message” definition should incorporate messages sent by third parties at the direction of a person to whom the Act would not otherwise apply if such person were sending the messages directly, such as when a multiple listing service sends e-mail messages directly to prospective property purchasers at the direction of a real estate professional who is a participant in the multiple listing service.

A. Association Communications Are “Transactional or Relationship Messages”

From a trade association perspective, NAR believes that the Commission should refine the statutory definition of “transactional or relationship messages” so that it includes communications between an association and its members. The Act defines a transactional or relationship message in terms of an ongoing commercial transaction between two parties, including communications between the parties related to a commercial transaction, such as providing updated warranty information or account balances. These communications are not considered “commercial electronic messages” and are not subject to the requirements in the Act.

The relationship between an association and its members is also an ongoing commercial transaction, whereby members pay dues to the association in return for certain services and benefits. The Act’s language plainly applies to permit a trade association like NAR to allow unregulated communications with its members about such topics as account balances or related to an ongoing transaction between the association and the member involving products and services purchased by the member. However, it is not clear whether other communications between associations like NAR and its members involving association programs and services are likewise exempt from the Act’s requirements.

Like a business communicating with its customers as part of an ongoing commercial transaction, NAR believes associations should be able to provide communications to its members regarding the services and benefits that it offers to its members without regard to the Act’s requirements. These communications are analogous to the very types of communications the Act permits businesses to make with each other, and so should be permitted in the trade association context. Of course, the communications between an association and its members should be limited to association business activities and benefits, with any other communications being regulated under the Act’s commercial electronic message rules.

The information, programs, activities and benefits offered by associations that are the common subject of e-mail communications to members are examples of the reasons individuals choose to join REALTOR[®] associations and pay dues, and thus the relationship between associations and their members is precisely analogous to ongoing commercial transactions such as a “subscription,” which is already covered by the Act. NAR therefore urges the Commission to adopt modifications to the rules confirming that association communications with members that fall within the “transactional or relationship” definition contained within the Act.

NAR’s position that “transactional or relationship messages” includes communications between an association and its members is also supported by congressional intent. Specifically, Representative Burr, a senior member of the House Energy and Commerce Committee, stated the following as a precursor to passage of CAN SPAM,

Individuals or businesses that opt to join [trade] associations do so in large part because of the outstanding benefits afforded to them, including reduced professional insurance premiums, continuing education opportunities, legislative awareness seminars, and conventions.¹

Representative Burr further indicated,

These e-mails are a valuable element of membership privileges agreed to by the member upon joining, as they keep the member apprised of upcoming events, industry-related products, and legislative alerts It is my belief that association members have essentially opted-in to the receipt of these e-mails by virtue of their membership, and that these e-mails would fall under the definition of “transactional e-mails” that S. 877 contains. Therefore, e-mail between a professional or trade association and its members should be a protected and mutually agreed-to line of communication and is hence not included in the definition of spam in the CAN SPAM Act of 2003.²

B. The Act Should Not Apply to a Real Estate Professional’s Communications with Clients and Customers

NAR seeks confirmation from the Commission that the business relationship between a real estate professional and his/her client or customer qualifies as an ongoing commercial transaction, to which the requirements of the Act do not apply.

Real estate professionals often enter into written representation agreements with buyers and sellers of real estate that, at the outset of their business relationship, do not include a monetary exchange. The representation agreement usually requires the client to use the services of the real estate professional for a specified period of time, with the obligation of the client to compensate the real estate professional only when, and if, the client successfully sells or purchases a property. In some cases there may be no agreement at all between a real estate professional and a prospective purchaser which the professional agrees to serve, or the agreement between the professional and the prospective purchaser may require that the real estate professional seek to be paid by a third party, such as a cooperative fee paid by the seller’s real estate professional to the buyer’s agent. During the course of the relationship, there is quite a bit of communication between the real estate professional and client, and such communication occurs with increasing frequency in the form of e-mail. Such communication involves, of course, information about properties that may be of interest to the prospective purchaser, and may also involve recommendations by the real estate professional of particular third-party professionals such as inspectors, attorneys, and lenders.

NAR urges the Commission to adopt rules that confirm that the relationship between a real estate professional and his client or customer qualifies as an ongoing commercial transaction so that electronic mail messages to the client or customer are transactional or relationship messages. Of

¹ 150 Cong. Rec. E5 (daily ed. Jan. 20, 2004) (statement of Rep. Burr).

² *Id.*

course, these communications would be limited to messages concerning the services provided by the real estate professional to the client. Additionally, these communications should not allow real estate professionals to send clients or others unsolicited electronic mail messages from third parties, like moving companies or other sellers. NAR believes such a rule is necessary because the statutory language appears to focus on “commercial transactions,” which presumably require the payment of consideration. Because in many cases no compensation is paid to the real estate professional until the end of the transaction (and, indeed, in some cases no compensation is ever paid to the professional, such as where no real estate transaction is completed), it may be asserted that this relationship between real estate professionals and their clients and customers is not a commercial transaction involving e-mail messages to which the Act does not apply. Since the relationship between the real estate professional and his/her client constitutes an ongoing commercial relationship, albeit one with characteristics that differ from a conventional purchase of a product or service, NAR believes any messages sent by a real estate professional to the client or customer should be defined as transactional or relationship messages. The Commission’s clarification on this point is sought by NAR.

C. Third Parties Can Act as Agents for Persons Exempt From the Act and are Likewise Exempt

Finally, NAR would like the Commission to clarify that the electronic mail messages described below are transactional or relationship message not subject to the Act’s requirements.

A multiple listing service, or “MLS”, is an entity through which real estate brokers share property listing data and offer to cooperate with each other to facilitate real estate transactions involving such listed properties. Many REALTOR[®] associations own or operate their own MLSs, in accordance with rules promulgated by NAR. The MLSs are supported by fees paid by MLS participants or subscribers.

In recent years, MLSs have increasingly moved to an Internet-based format to better serve their subscribers. One feature that some MLSs have offered to their subscribers is to enable participating real estate professionals to customize property listing data searches for individual clients or customers seeking to buy property meeting certain specified criteria. Once this data search is created and the prospective purchaser’s property preference criteria submitted to the MLS, the MLS will “automatically” send an electronic mail message to the prospective purchaser, who is the real estate professional’s client, whenever a new property listing that meets the client’s search criteria is submitted to the MLS. In some cases, these electronic mail messages are sent directly from the MLS to the client. This facility provides a convenient and automated way for real estate professionals to satisfy their clients’ desires and needs without the burden of individually searching the MLS property listing database personally and sending the purchaser an e-mail of properties meeting the purchasers criteria.

As described above, NAR believes and seeks confirmation from the Commission that e-mail messages sent by the real estate professional to his client or customer are transactional or relationship messages to which the requirements of the Act do not apply. Similarly, NAR would like the Commission to clarify and confirm that electronic mail messages sent by an MLS in the circumstances described above are the functional equivalent of the real estate professional sending them to the client or customer directly, and therefore are also transactional or

relationship messages which would not be considered commercial electronic messages subject to the Act's requirements. NAR believes this is the proper result because the messages arise out of, and are generated from, an ongoing commercial relationship between the real estate professional and his/her client, with the MLS simply serving as the subscriber's agent in delivering the information directly to the client.

III. 10-Business-Day-Time Period for Processing Opt Out Requests Is Not Reasonable

Pursuant to Congressional directive, the Commission is seeking comment on whether 10 days is a reasonable time period for a business to process opt-out requests received from consumers. NAR supports the implementation of a rule containing a longer period for businesses to respond to opt-out requests, as the 10-day period creates a costly burden upon small businesses like a real estate brokerage and is thus unreasonable.

Most of NAR's members are small business owners. Such a short time period for incorporating a consumer's opt-out request places NAR's members in danger of inadvertently violating the Act, as they may not have the resources to instantaneously incorporate these consumer requests into all of their electronic mail lists. NAR proposes the Commission adopt a rule incorporating a longer period, such as the 31-day period the Commission recently included in its Do Not Call Rules. A longer time period will give small businesses a reasonable time to assure the consumer's opt-out request is processed and will not detrimentally effect the interests of those receiving commercial electronic messages, as businesses will still have to cease sending commercial electronic within a relatively short time frame.

IV. Commission Should Clarify the "Sender" Definition, Including Application to "Forwarded" Messages

NAR believes the Commission should clarify that a "sender" of an electronic mail message is limited to the party who controls all aspects of an electronic mail message.

The Act defines a "sender" of an electronic mail message as "a person who initiates such a message and whose product, service, or Internet web site is advertised or promoted by the message." In its Advanced Rulemaking Notice, the Commission sought comments on the scope of this definition, including whether the definition encompasses every individual or entity whose product is promoted within the electronic mail message qualifies as a sender. Additionally, the Commission has sought comment on the effect of forwarding an electronic mail message.

NAR believes that the Commission should limit the definition of "sender" to include only the individual or entity who has control over the electronic message, irrespective of whether any product or service of another party is advertised or promoted in the electronic message. Control over the electronic message would required an examination of a variety of factors including: the party who transmits the electronic mail message or causes the message to be transmitted; the party who is identified in the message as the sender; control over the form of the electronic mail message; control over the time the message is sent; control over the recipients of the message; and control over the content of the message. NAR communicates via e-mail with its nearly 1,000,000 members, and includes in some of those communications information about products

or services offered by other parties that may be of interest to the members. It would impose a heavy burden upon NAR to have to check multiple opt-out lists of the sellers of such products and services against hundreds of thousands of e-mail addresses every time it wants to send otherwise lawful communications to its members containing advertisements. NAR's messages are clearly identified as coming from NAR and NAR controls all aspects of these messages - indeed, the messages from NAR contain information that the members expect to receive from NAR and is the reason many members join NAR. Moreover, and as noted above, third-party advertisements contained in an NAR initiated electronic mail messages are ordinarily incidental to the message's content and would be understood as such by the recipient. Broadening the definition of sender would impose a costly and unnecessary burden on NAR's communications with its members without benefit, since any members who preferred not to receive NAR messages containing advertisements or promotions of the products of others could simply opt-out of receiving such e-mails from NAR. Thus, the definition of sender should be clarified to apply only to the individual or entity who controls and initiates the sending of an electronic mail message, whether or not the message contains information about products or services sold by others.

In regards to the mail forwarding questions posed by the Commission, NAR also believes that the requirements of the Act should not apply to someone other than the individual or entity who actually initiates the sending of a message, except perhaps if consideration is paid by a party initiating a message to a recipient who "forwards" that message in exchange for that consideration. All other message forwarding by message recipients should not invoke application of the Act's requirements to the original message sender with respect to a message recipient other than the party to whom the original sender directed the message. The original sender has no control over the message after transmission to the original recipient, and thus it is impossible for that sender to assure that the message complies with the Act's requirements with respect to other recipients. Fundamental fairness also requires that a sender not be held responsible for sending a message to a party who has opted-out when in fact another party has sent the message to such person, and the sender has no ability to control or prevent the message from being sent indirectly improperly. Thus, the definition of "sender" should only include the original sender of a forwarded message when some type of consideration has been exchanged between the parties- all other message forwarding should not be covered within the Act's definition of a sender.

V. Conclusion

NAR's comment letter has addressed four specific areas about which the Commission has sought input. First, NAR believes the "primary purpose" test for commercial electronic mail messages should simply involve an examination of the electronic mail message's commercial content, in light of a series of factors. Second, NAR seeks clarification of the "transactional or relationship" definition contained within the Act so it is clear that this definition covers communications between an association and its members for association-related activities and benefits. NAR has also requested clarification of this definition for specific examples impacting multiple listing services and real estate professionals. Third, NAR seeks a longer period for businesses to respond to opt-out requests, as the 10-day period creates a costly burden upon small businesses like a real estate brokerage. Finally, NAR seeks clarification on the Act's definition of "sender,"

including application of the Act's requirements to the original sender of a message when the message is forwarded by the initial recipient to one or more subsequent recipients.

Yours truly,

Walt McDonald